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SUPREME COURT, U.S.
No. 416

District Court of the United States

DISTRICT OF RHODE ISLAND

416

UNITED STATES OF AMERICA,
Plaintiff (Appellant),
v.
WALLACE & TIERNAN COMPANY, INC., *et al.*,
Defendants (Appellees).

CIVIL ACTION
NO. 705

STATEMENT MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES,

AND

MOTION BY DEFENDANTS (APPELLEES) TO DISMISS ATTEMPTED APPEAL

CHARLES H. TUTTLE
LOREN N. WOOD
WILLIAM H. EDWARDS
Of Counsel

EDWARDS & ANGELL
Attorneys for Wallace & Tiernan Company, Inc., et al.

LAURENCE J. HOGAN
Of Counsel

HOGAN & HOGAN
Attorneys for Novadel-Agene Corporation, et al.

S. EVERETT WILKINS, JR.
MATTHEW W. GORING
Of Counsel

HINCKLEY, ALLEN, TILLINGHAST & WHEELER
Attorneys for Builders Iron Foundry, et al.

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5 3432-3

SUBJECT INDEX

CASES CITED

OTHER AUTHORITIES CITED

District Court of the United States

DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, *Plaintiff (Appellant)*, *v.* WALLACE & TIERNAN COMPANY, INC., *et al.*, *Defendants (Appellees)*.	CIVIL ACTION NO. 708

STATEMENT MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES,

AND

MOTION BY DEFENDANTS (APPELLEES) TO DISMISS ATTEMPTED APPEAL

Pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the appellees:

1. File this Statement of Matters and Grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant;

2. Move to dismiss the attempted appeal.

In support of the foregoing the appellees submit the following:

Matters and Grounds

In an action of this kind, a direct appeal to the Supreme Court of the United States lies only from a final decree which is involuntary or uninvited on the part of the appellant.*

* The words "appellant" and "plaintiff" are used interchangeably hereafter. References to pages of the transcript of hearings in the District Court use the page numbers of the official reporter's record on the dates specified.

A United States District Court has inherent judicial power to dismiss, without prejudice, an action for non-prosecution. Rule 41 of the Rules of Civil Procedure does not limit this power. (*Carnegie Nat. Bank* v. *City of Wolf Point*, 110 Fed. (2) 569, 572.)

In the present instance, after the District Court had on August 6, 1948, rendered its "opinion" that the complaint herein should be dismissed "without prejudice", the plaintiff served on August 27, 1948, a notice reading:

> "Please take notice that the attached Judgment will be submitted to the Court at 11.30 o'clock on Sept. 3, 1948."

On September 3, 1948, a "Judgment" in the precise form thus sponsored and proposed by the plaintiff-appellant herein, was entered. It read as follows:

> "The above entitled case came on for trial on June 2, 1948 and, pursuant to the Court's opinion dated August 6, 1948, it is ORDERED, ADJUDGED, AND DECREED:
>
> "That the Government's 'request' for judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice."

Thus, the Judgment of September 3, 1948, as thus sponsored for settlement by the appellant itself, incorporated and effectuated the "Court's Opinion dated August 6, 1948," in which opinion the Court had found as a fact and determined that (p. 21):

> "The reality here practically amounts to *non-prosecution* since the Government states that other evidence than the suppressed documentary evidence 'might be obtained' to establish violations of the Sherman Act." (Italics ours.)

Furthermore, the Judgment of September 3, 1948, as thus sponsored for settlement by the appellant itself, judicially and definitively declared and determined that the

judicial action on August 6, 1948, was the delivery of an "Opinion" and not *the* "Judgment." Also it superseded what had gone before.

Nevertheless, the appellant's papers on this attempted appeal, dated October 4, 1948, recite the attempted appeal as being taken, not from this "Judgment" entered on September 3, 1948, upon the plaintiff's own application and in the precise form proposed by it, but from what that very Judgment describes as, and determines to be, "the Court's Opinion dated August 6, 1948."

The appellees accordingly assert lack of jurisdiction and appealability for each of the following reasons:

(1) There can be, in an action under the Sherman Law, but one "final decree" from which appeal may be taken direct to the Supreme Court of the United States; and neither an opinion nor even an order for judgment is such "final decree",—particularly where a formal "Judgment" is thereafter proposed by the party intending an appeal and is entered by the Court. (§29, Title 15, U. S. C. A.) (See Footnote.);

[FOOTNOTE: As already stated, on August 27, 1948, the plaintiff served this Notice: "Please take notice that the attached Judgment will be submitted to the Court at 11.30 o'clock on Sept. 3, 1948." The phrasing and form of Judgment attached to this Notice were precisely the phrasing and form of the Judgment as entered by the Court on September 3, 1948. Thus, both the plaintiff and the District Court recognized the propriety and need of a formal Judgment to implement and effectuate the "Opinion dated August 6, 1948," and both also have recognized and created the Judgment of September 3, 1948, as *the* Final Judgment.

Whether or not the judicial event on August 6, 1948, standing alone, could have been interpreted as a judgment, the inescapable fact is that a month later the plaintiff and the Court declared and determined it to be the delivery of an "Opinion" and effectuated and superseded it by the "Judgment" of September 3, 1948. Hence, an attempted appeal, taken solely from the judicial event of August 6, 1948 is not "from the final decree of the District Court" (§29 of Title 15, U. S. C. A.). It confers no jurisdiction on the Supreme Court of the United States, and should be dismissed. (*United States* v. *Hark*, 320 U. S. 531.)

As said in that case (p. 534):

> "Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry. In recent cases we have so treated it." (Citing *U. S.* v. *Resnick*, 299 U. S. 207; and *U. S.* v. *Midstate Horticultural Co.*, 306 U. S. 161.)

Also directly in point are: *St. Louis Amusement Co.* v. *Paramount Film Distributing Corp.*, 158 Fed. (2) 30, 31 (C. C. A. 8); *Judson* v. *Gage*, 98 Fed. 540, 543 (C. C. A. 2); *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 Fed. (2) 855, 858 (C. C. A. 8); *McGhee* v. *Leitner*, 41 Fed. Sup. 674, 676.]

(2) that, on this record, this finding of fact and determination by the District Court that "the reality here practically amounts to non-prosecution," were sustained by sufficient evidence;

(3) that this record shows that the Judgment in its present form and wording was not only proposed but invited and maneuvered for by the appellant and hence is not appealable by it in any event; and

(4) that the United States Supreme Court is without jurisdiction to entertain the attempted appeal.

I

The Findings and Determination by the District Court

The evidence on which the Court based its findings of "non-prosecution" is set forth in much detail in the Court's opinion of twenty-two pages, filed August 6, 1948, and incorporated in the judgment of September 3, 1948, in accordance with the form of judgment proposed by the appellant.

These findings of fact were (Opinion, p. 21):

"I find that the plaintiff has not produced any facts or evidence in support of the complaint.

After the Government completed the presentation of its evidence the defendants did not move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The reality here practically amounts to non-prosecution since the Government states that other evidence than the suppressed documentary evidence 'might be obtained' to establish violations of the Sherman Act."

As to the law, the District Court held that a court of equity has inherent power "to dismiss a cause for failure or want of diligence in prosecution"; and that if a plaintiff "declines or fails to offer evidence, the court may, in its discretion, dismiss his action without prejudice". The Court cited:

Carnegie Nat. Bank v. *City of Wolf Point*, 110 F. (2d) 569, 572;

Hicks v. *Bekins Moving & Storage Co.*, 115 F. (2d) 496;

Rudolph v. *Senseney*, 39 App. D. C., 385, 388.

II

The Evidence Showing Non-prosecution and an Invited Dismissal

(1) When the case was called on the trial calendar on June 2, 1948, Mr. Tuttle, counsel for the defense, demanded to know whether the plaintiff was intending to conduct a trial "in the usual sense of the word," contrary to its past assurances that it did not so intend. Mr. Tuttle stated that otherwise, the defendants would want several months for preparation (Tr. 3-5). The plaintiff's past assurances were thereupon quoted by Mr. Tuttle (Tr. 3). Briefly, they were these:

At the court hearing on May 24, 1948, in discussing the plaintiff's attitude if the case were called up for trial, its counsel said (Tr. 11):

> "Mr. Kelleher: I wish to assure counsel and the Court that in view of the rulings of the Court announced today, *the Government does not intend to offer evidence* if a date (for trial) is granted as we have requested." (Italics ours.)

Accordingly, when, at the opening of the so-called "trial" on June 2, 1948, the defense counsel quoted the foregoing assurances on May 24, 1948, by the plaintiff's counsel, the latter said that he was not asking for and would not conduct a trial "in the usual sense of the word". To quote (Tr. 4):

> "Mr. Kelleher: I wish to state now that in accordance with Mr. Tuttle's statement that there would be no trial 'in the usual sense of the word,' which is the precise language which he used throughout his statement, that that is correct."

The plaintiff's counsel then followed this assurance with the further assurance to the defense that it need do nothing at all in connection with the proceedings which the plaintiff was about to take and that the defendants would not be prejudiced thereby. To quote the plaintiff's counsel (Tr. 4):

> "Mr. Kelleher: I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time."

In accepting this assurance, the plaintiff's counsel further said (Tr. 5):

> "Mr. Kelleher: I can assure counsel they are perfectly prepared for what we are going to do this afternoon and if anything comes up and you wish a continuance, we will consent to it. I am perfectly certain you will not need it and will not request it."

There then ensued the following statements by defense counsel and by the Court (Tr. 6):

> "Mr. Tuttle: Yes, Your Honor. I am relying on the fact that Your Honor has in mind that we received

at the past hearing certain assurances and that we are here on the basis of those assurances and nothing else.

The Court: Very well, you may proceed, gentlemen, *with that understanding.*" (Italics ours.)

(2) In the so-called "trial" which then ensued, on the basis of these assurances by plaintiff's counsel, he said he would "like to file with the Court an affidavit" (Tr. 21) which he was "not treating as evidence being given under oath" (Tr. 22), but which "assumes as the background the record thus far made in this court" (Tr. 22). Defense counsel objected to the filing or receipt of the affidavit for any purpose (Tr. 23-6); but the Court said (Tr. 28):

> "However, I am going to allow the affidavit to be filed because, in the opinion of the Court, it is nothing more than a statement by the Government why it is unable to proceed with the case further today. The affidavit may be filed."

The affidavit thus filed was by Mr. Kelleher himself. We quote from it as follows (Court's opinion of August 6, 1948, pp. 12-13):

> "Affiant further avers that the subpoenaed documents constitute substantially all of the Government's evidence in this case. Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. Most of such additional evidence would depend for its admissibility upon its connection with the defendants through other evidence;

such connection can only be established through certain of the subpoenaed documents and the Government therefore cannot offer the additional evidence *de bene* unless it is permitted also to offer the subpoenaed documents. The rest of the additional evidence is so incomplete and piecemeal as to be, virtually meaningless without the subpoenaed documents as a setting for such evidence. In other words, the additional evidence either depends upon the subpoenaed documents for its own admissibility or is unintelligible without them. Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint and *although conceivably such evidence might be obtained, that could only be done after an investigation coextensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents.*" (Italics ours.)

It was to these italicized words that the District Court alluded as aforesaid in its opinion of August 6, 1948, when it found (p. 21) that: "The reality here practically amounts to non-prosecution," since the Government conceded that other evidence "'might be obtained'" but that it preferred to leave the case "in its present posture".

The only other step taken by the plaintiff's counsel at this so-called "trial" was the rather farcical one of calling his associate counsel, Mr. Alfred Karsted, as a "witness" (Tr. 14), and asking him whether, in the course of his participation in the investigation by the "Special Grand Jury" (which the plaintiff now concedes to have been rightly held by the Court an illegal and unconstitutional body), he had examined certain documents which the plaintiff's counsel admitted to be among those ordered by the Court to be returned to the defendants (Tr. 15-20).

Defense counsel objected to this questioning on the grounds that it was an improper effort to elicit hearsay and secondary evidence as to the contents of written documents; that it was an improper effort to make use of information contained in documents which had been illegally and unconstitutionally seized and used by the illegal grand jury and the Department of Justice; and that the proposed testimony would be immaterial, irrelevant and incompetent (Tr. 16-20). The Court thereupon sustained the objection. Thereupon the plaintiff's counsel stated that he had "no further questions" (Tr. 20). Since there was no cross-examination, the so-called "witness" left the stand (Tr. 20).

The plaintiff's counsel then followed the foregoing illusion of a trial with the announcement that "the plaintiff rests" (Tr. 29); and defense counsel rejoined: "I cannot conceive what I am called upon to say or do" (Tr. 29).

Notwithstanding that he had not presented any evidence (least of all, proved anything), the plaintiff's counsel then achieved an "all-time high" in extraordinary and artificial applications in court, by saying (Tr. 32):

> "I urge Your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint."

Plaintiff's counsel then heightened (if that were possible) the transparent insincerity of this application by refusing the Court's request for a statement of the "grounds" for so unheard-of a proposal (Tr. 32-37), and summed up his position by this invitation to the Court (Tr. 33):

> "Mr. Kelleher: *I am asking Your Honor to dispose of the case.*" (Italics ours.)

And again (Tr. 36):

"Mr. Tuttle: The prosecution has rested upon nothing. It says it has rested. There is no magic in those words. It has just done nothing in a legal sense here today.

The Court: That is the difficulty, gentlemen, you are confronting the Court with, to put it bluntly and plainly; * * *

Mr. Kelleher: *All I ask Your Honor is to rule.*" (Italics ours.)

To this invitation (the only possible disposition being a dismissal for non-prosecution), the defense counsel and the Court rejoined as follows (Tr. 45):

"Mr. Tuttle: We are not resting the case in the sense that there is a prosecution which has been proved or as to which evidence has been presented. We are simply saying that we regard this as non-prosecution and that we are not—

The Court: To be frank with you, gentlemen, that is what it appears to the Court at the moment. Whether I am right or not in that, I don't know, but I am going to take time to find out whether or not the Court has a right to dismiss this because of the record."

Briefs were thereupon submitted and the decision expressed in the Court's aforesaid opinion of August 6, 1948, and its judgment of September 3, 1948, followed.

III

The "reality" was non-prosecution and an invited dismissal, suggested, requested, maneuvered for and even phrased by the plaintiff.

(1). The foregoing makes plain that the so-called "trial" on June 2, 1948, was not a trial at all, but rather a sort of pantomime whereby, foregoing the "time and labor" of securing the obtainable evidence free from constitutional inhibition, the plaintiff's counsel presented no evidence, filed an affidavit which he was "not treating as evidence" (Tr. 21), asked his own associate, imaginatively called a "witness", a few non-probative and utterly incompetent questions, and "rested" (Tr. 29). On the basis of this vacuum, he then said he was "asking Your Honor to dispose of the case" (Tr. 33).

True, the plaintiff's counsel wound up the rather hilarious day by stating that he was making a "summation", which he rhetorically concluded by saying (Tr. 43): "Your Honor, I request judgment for the plaintiff." Quite understandably the astonished District Court exclaimed (Tr. 33):

> "The Court: I never heard of such a thing, of a Court being asked to do something that was not based upon evidence."

Thus, at the close of the so-called "trial" of June 2, 1948, the situation was solely the plaintiff's own contrivance, and was quite in keeping with the assurance of the plaintiff's counsel at the very outset that defense counsel need do nothing since they "will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time" (Tr. 5).

Accordingly, the role of the defense, as thus allotted by plaintiff's counsel himself, was solely that of spectators; and at the end defense counsel stated (Tr. 44):

"Mr. Tuttle: I have stated, Your Honor, that we interpret this situation as one where the Government — whatever terminology it chooses to use — nevertheless, is, in fact and in law, confessing non-prosecution; and that we do not, consequently, feel called upon to quarrel with the Government over that. Now we say frankly that under those circumstances we do not regard ourselves as required to go on with the evidence or with anything at all for that matter. * * *"

(2) Nor was this purpose and plan on the part of the plaintiff to seek, invite and, if necessary, force a termination of its own case by a judgment of dismissal, any sudden decision at the so-called "trial" on June 2, 1948.

As far back as the hearing of April 20, 1948, on the plaintiff's motion for a certain postponement, the plaintiff's counsel had requested the Court to set a date for this nominal "trial", saying (Tr. 11):

"Mr. Kelleher: * * * we are prepared to announce to the Court that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; *and we will, therefore, suggest to Your Honor that you enter judgment with prejudice against the Government* and from that judgment we shall appeal directly to the Supreme Court of the United States." (Italics ours.)

And later, at the hearing of May 24, 1948, on the defendants' motions to quash certain subpoenas, the plaintiff's counsel, while still asserting that he still proposed to request the Court to enter a judgment of dismissal, modified as follows the aforesaid content of the judgment of dismissal which on April 20, 1948, he had stated he would request (Tr. 12):

"Mr. Kelleher: Since making that statement (on April 20) we have been considering whether judgment with prejudice or without prejudice should be entered, and I do not intend to concede that the judgment to be entered should be with prejudice."

Thus, as near as May 24, 1948, to the so-called "trial" of June 2, 1948, the plaintiff, through its counsel, formally announced in open Court that when the case came up for the so-called "trial" it would suggest to the Court a judgment of dismissal without prejudice—precisely the form of judgment which (as aforesaid) the plaintiff proposed for settlement by notice dated August 27, 1948, and procured to be entered on September 3, 1948.

(3) *The law is well settled that a plaintiff who requests or invites a judgment of dismissal or non-prosecution, or maneuvers for it,* and, in this case, even proposes the form and phraseology of it, *cannot appeal therefrom,* particularly where such judgment is, at the plaintiff's own request, "without prejudice" and thus gives the plaintiff the benefit of a full opportunity to bring a new action and to support it with the competent and lawful evidence which Mr. Kelleher's aforesaid affidavit indicated could be available after "an investigation coextensive in time and labor" (Court's opinion of August 6, 1948, pp. 12, 13).

This well settled rule is thus stated in the headnote to the decision of the Circuit Court of Appeals for the 8th Circuit in *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354:

"No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a national court at his request or with his consent. Such a judgment, however, rendered on the motion of the defendant and against the objection and the protest of the plaintiff is reviewable at the latter's instance."

In the course of its opinion, the Circuit Court of Appeals said (p. 355):

> "But invited error is irremediable. If the court erred in the rendition of the judgment of nonsuit, it erred at the plaintiff's request and to the prejudice of the defendant, and that error can form no ground for the reversal of the judgment at the suit of the plaintiff who procured it. A judgment of nonsuit upon the motion or request of the defendant and against the objection or protest of the plaintiff is reviewable by writ of error. *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 29, 39, 40, 11 Sup. Ct. 478, 35 L. Ed. 55; *Meehan* v. *Valentine*, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835."

Another decision which seems to fit perfectly is that of the Court of Appeals of the District of Columbia in *Rudolph* v. *Senseney*, 39 App. D. C. 385 (not otherwise reported). There, in a proceeding to condemn lands for an alley, the petitioning Commissioners contended at the trial that their own determination was conclusive, and they refused to produce proof showing the necessity for the proposed alley. In other words, having obtained a day in court for trial, the Commissioners refused to proceed with the presentation of evidence available to them on an issue which in law was essential to their case. Thereupon the Supreme Court of the District of Columbia entered an order reading as follows (p. 387):

> "Upon consideration of the petition of the commissioners of the District of Columbia, filed herein, and of the answers filed thereto by George W. Senseney et al., and of the announcement made, in open court, by counsel for the said commissioners, that the said commissioners decline to proceed with the prosecution of this proceeding in conformity with the order of the court heretofore passed herein as to

proof of the necessity of said proposed alley, it is, by the court this the 19th day of April, A. D. 1912, ordered that the said petition of the said commissioners be, and the same, is hereby, dismissed."

From this order the Commissioners took an appeal which the respondent moved to dismiss. In granting dismissal, the Court of Appeals said (p. 388):

> "Without a bill of exceptions we are confined to the recitals of the order itself in considering its nature and effect. So considered, *our conclusion is that it indicates a voluntary nonsuit by the plaintiffs.* * * *.*
>
> "*If he declines or fails to offer evidence, the court may in its discretion dismiss his action without prejudice, or enter a judgment against him.* Substantially, this is what the plaintiffs in this case did. *The situation is of their own creation*, no matter what was the inducement thereto, and there is nothing from which they can appeal. The appeal is dismissed." (Italics ours.)

To the same effect are: *Evans* v. *Phillips*, 4 Wheaton 73 and *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 39.

IV

Moreover, the plaintiff (the appellant now) allowed certain basic orders to become final by compliance and failure to appeal, and cannot now revive by indirection or circuity or collateral attack its expired opportunity for appealing.

Aside from the foregoing considerations which, we submit, show conclusively that the United States Supreme Court has no jurisdiction and that this attempted appeal cannot be entertained, the same result follows from the plaintiff's course in giving to certain basic determinations and decrees finality in fact and in law.

The record discloses the following main proceedings in the District Court:

(1) Subpoenas of the so-called "Special Grand Jury", compelling production by the defendants before that body of over 200,000 sheets; the impounding thereof on the plaintiff's application; and the search, examination and use of such papers by the assistants of the Attorney General and by the "Special Grand Jury." This was an autonomous proceeding, entitled "In re Grand Jury Investigation" and docketed "Misc. 5301."

(2) A subsequent purported Indictment of the defendants ("Criminal Action No. 6055") filed on November 18, 1946 by such "Special Grand Jury", but later dismissed (without appeal) as not due process and as not found by a constitutional body.

(3) A proceeding by the defendants for the return of the papers so seized, impounded and searched; and the subsequent return of them pursuant to an unappealed decree of the court.

(4) A subsequent Criminal Information (No. 6070) against the same defendants, repeating *verbatim* the

allegations and charges of the dismissed Indictment, and filed after the latter's dismissal.

(5) A subsequent independent proceeding by the defendants to recover from the Attorney General's office the photostatic copies made by it of some 7,000 of the multitudinous papers seized, impounded and searched as aforesaid; and the subsequent delivery of them to the defendants pursuant to an unappealed decree of the Court.

(6) This present civil action (No. 705) against the same defendants, the complaint wherein is mere repetition *verbatim* of the allegations and charges of the dismissed Indictment and of the Information.

These six proceedings are discussed in the following like numbered Subdivisions.

(1)

The seizure, impounding and search of the defendants' papers and property.

Defendants resisted the multitudinous demands of the aforesaid subpoenas of the "Special Grand Jury" as an oppressive abuse of process; but the Court denied their test motions to vacate.

Thereupon, the two hundred thousand papers were seized and were impounded in Providence, Rhode Island, at the instance of the Department of Justice and were searched, examined and used by it and the "Special Grand Jury." Some were put in evidence before that body. The purported "Indictment" ensued.

(2)

The determinations that the so-called "Grand Jury Investigation" and the "Indictment" were not due constitutional process, and that the "Special Grand Jury" was not a lawful, constitutional body.

On the authority of *Ballard* v. *United States*, 329 U. S. 187, and *Zap* v. *United States*, 330 U. S. 800, the defendants moved to dismiss the Indictment as filed by a body without constitutional existence since, notwithstanding the laws of the State of Rhode Island for the service of women on grand and petit juries in that State, the District Court of the United States in Rhode Island had continuously and intentionally excluded women from all its juries, including this "Special Grand Jury."

The Notice of this Motion to dismiss the "Indictment" was dated December 21, 1946, and it recited, as its grounds in law, that:

> "The Special Grand Jury which returned the indictment to this Court was not selected, drawn, or summoned in accordance with law; and such indictment did not constitute due process of law."

This motion was sustained by the Court in an opinion delivered orally on March 19, 1947, on the authority of the *Ballard* and *Zap* cases. A decree accordingly was entered.

(3)

By electing not to exercise its acknowledged right of appeal, the plaintiff gave finality to the decree annulling the so-called "Grand Jury Investigation" and dismissing the "Indictment" as violative of the Fourth and Fifth Amendments.

The plaintiff's "Statement as to Jurisdiction", filed herein on October 4, 1948, states (p. 3), as to the dismissal of the Indictment, that *the plaintiff, "believing this decision correct, took no appeal from the judgment of dismissal."*

This concession in the appellant's present "Statement as to Jurisdiction" is not a recent conclusion on its part. As far back as April 20, 1948, its counsel had stated, during a hearing in court (Tr. 30):

> "Mr. Kelleher: I have explained the reason we didn't appeal (from the dismissal of the Indictment). * * * I have explained that, that the Government felt Your Honor was right."

The plaintiff could have appealed direct to the Supreme Court of the United States, if it had so desired.

> U. S. C. A., Title 18, §682;
> U. S. C. A., Title 15, §29;
> Rule 12 of the Federal Rules of Criminal Procedure.

In consequence, the determinations of law and fact implicit in the decree annulling the so-called "Grand Jury Investigation" and dismissing the "Indictment" as violative of the Fourth and Fifth Amendments have at all times since been final, undisputed and *res adjudicata* between the same parties in all proceedings and actions.

(4)

The decree of March 19 1947, directing the return of the seized, impounded and searched documents (property of the defendants) was final in law; and the plaintiff also gave it finality in fact by complying therewith and by not appealing therefrom.

(a) The law is well settled that grand jury subpoenas *duces tecum* constitute compulsory production and seizure, followed by search, of property and papers; and that, if such production, seizure and resultant search are by or for a purported grand jury having no status in law, or by representatives of the Department of Justice in aid of such illegal body, the Fourth and Fifth Amendments have been violated and the property "so secured may be regained". (*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 202, footnote; *Boyd v. United States*, 116 U. S. 616, 634-5; *Feldman v. United States*, 322 U. S. 487, 492.)

(b) The proceeding in which the subpoenas *duces tecum* had been issued was an independent proceeding and inquiry before the "Special Grand Jury" (now conceded to be a body without status in law). That proceeding was docketed as "Misc. No. 5301"; and the papers therein were entitled (to quote the caption of the order of June 3, 1946, impounding the seized documents):

"In Re Grand Jury Investigation

Entitled

United States

v.

Wallace & Tiernan Co., Inc., et al."

This order recited that the documents had been "subpoenaed on behalf of the Special Grand Jury"; and the

subpoenas themselves (to quote the typical body of those dated August 26, 1946) read:

> "You Are Hereby Commanded to appear before the Special Grand Jury of the District Court of the United States for the District of Rhode Island * * * and also that you bring with you and produce at the time and place aforesaid, the books, papers and documents designated as Exhibit A attached hereto and made a part hereof, then and there to testify concerning certain matters under investigation by the said Special Grand Jury."

(c) Simultaneously with their aforesaid motion to dismiss the "Indictment", these defendants (other than Builders Iron Foundry and Chafee) petitioned for a decree compelling the return to them of their property, to wit: the several hundred thousand papers seized, impounded, searched and used by the Department of Justice and the "Special Grand Jury" in the course of the so-called "Grand Jury Investigation" preceding the so-called "Indictment", and hence prior to the criminal action purportedly instituted thereby. The like motion by the defendants Builders Iron Foundry and Chafee was made after the dismissal of the "Indictment".

Thus, the seizure, impounding, search and use of these papers in the present case differ entirely from an instance where the papers were unlawfully secured under color of procedure in a pending criminal action lawfully instituted and continued, to obtain evidence for the trial thereof.

Moreover, since the "Grand Jury Investigation" and the "Indictment" were, as is now conceded, nullities in law, there was, in the eye of the law, no subsequent criminal action instituted thereby, and hence no action at all in which the subpoenas, the impounding order and the decree for return could be regarded as intermediate.

Thus, the proceeding to recover the defendants' property was in essence and necessity and in fact and in law an autonomous and complete proceeding which was directed to annulling an unlawful taking and detention originating before any action was begun, and which was effectuated at a time when no lawful action was pending.

The decree entered March 19, 1947, directing the return was, therefore, a final decree from which the plaintiff could have appealed to the United States Circuit Court of Appeals under section 225, Title 28, U. S. C.A. (*Essgee Co. v. United States*, 262 U. S. 151, 152; *Cogen* v. *United States*, 278 U. S. 221, 226.)

Moreover, the plaintiff immediately complied with the decree and thereby added to its finality in law finality in fact.

(d) The issues of law and fact thus finally determined as between the parties by this decree were thus expressed by the District Court in its *oral* opinion of March 19, 1947 (Tr. 98):

> "The Court: There is no need of further discussion on this because the Court has already ruled the Grand Jury was illegally constituted. These papers were obtained as a result of subpoenas issued by an illegally constituted Grand Jury. Certainly defendants have a right to the return of their property under those circumstances. The motions for the return of the impounded documents are granted."

(e) Thus, here again, determinations of the issues of law and fact became final and *res judicata* between the same parties for all purposes and proceedings, and the papers became *not "admissible in evidence at any hearing or trial,"* (Rule 41e of the Federal Rules of Criminal Procedure.)

(5)

Likewise, the decree of February 18, 1948, directing delivery to the defendants of the photostatic copies made by the Department of Justice of some of their subpoenaed and impounded documents, was final in law; and the plaintiff also gave it finality in fact by complying therewith and by not appealing therefrom.

(a) On May 9, 1947,—some weeks after the dismissal of the "Indictment"—the defendants petitioned for the delivery to them of the photostatic copies made by the Department of Justice of some 7,000 of the 200,000 papers subpoenaed and impounded as aforesaid. Some of the papers so photostated had been put in evidence before the "Special Grand Jury."*

This petition for the delivery of these photostatic copies was an independent and separate proceeding. It was entitled:

"In the Matter of Motion of Wallace & Tiernan Company, Inc., et al., for return of documents."	Misc. No. 5347

(b) Such a proceeding has been held equivalent to an independent summary suit in equity. (*Essgee v. United States*, 262 U. S. 151, 152-3; *United States* v. *Rosenwasser*, 145 Fed. [2d] 1015, 1017, C. C. A. 9.)- Hence, the decree made therein was a final decree, not made in the purported criminal action which long previously had been dismissed as aforesaid; and it was appealable to the Circuit Court of Appeals under Section 225 of Title 28, U. S. C. A.

* The like petition by the defendants Builders Iron Foundry and Chafee was filed at a somewhat later date.

To quote the *Rosenwasser* case just cited (p. 1016-7):

> "Where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the court's order therein is appealable as a final decision. *Burdeau* v. *McDowell*, 1921, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 159; *Perlman* v. *United States*, 1918, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; *Cheng Wai* v. *United States*, 1942, 2 Cir. 125 F. 2d 915; *United States* v. *Poller*, 1930, 2 Cir., 43 F. 2d 911, 74 A. L. R. 1382."

It is also the universal holding that where, at the time when the application to suppress evidence or return papers is initiated, the criminal action for the purposes of which the evidence had been unconstitutionally seized, had not been begun or had been dismissed, such application is deemed an independent, separate proceeding equivalent to an independent suit in equity. A final determination therein is appealable to the Circuit Court of Appeals.

Cogen v. *United States*, 278 U. S. 221, 225-6;
United States v. *Byoir*, 147 F. 2d 336, 337 (C. C. A. 5);
United States v. *Rosenwasser*, 145 F. 2d 1015, 1016-7 (C. C. A. 9);
In re Investigation by Attorney General, 104 F. 2d 658, 659 (C. C. A. 2);
United States v. *Poller*, 43 F. 2d 911, 912 (C. C. A. 2);
Dickhart v. *United States*, 16 F. 2d 345, 346, Court of Appeals, District of Columbia;
In re Brenner, 6 F. 2d 425 (C. C. A. 2); 156 A. L. R. Ann. 1207, 1211.

To quote from the opinion in *Cogen* v. *United States*, 278 U. S. 221, *supra* (p. 225):

"Where the proceeding is a plenary one, like the bill in equity in *Dowling* v. *Collins*, 40 F. (2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution. Applications for return of papers or other property may, however, often be made by motion or other summary proceeding, by reason of the fact that the person in possession is an officer of the court. See *United States* v. *Maresca*, 266 Fed. 713; *United States* v. *Hee*, 219 Fed. 1019, 1020. Compare *Weinstein* v. *Attorney General*, 271 Fed. 673. Where an application is filed in that form, its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, whenever the application for the papers or other property is made by *a stranger to the litigation*, compare *Ex parte Tiffany*, 252 U. S. 32; *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; or wherever the motion is filed before there is an indictment or information against the movant; like the motions in *Perlman* v. *United States*, 247 U. S. 7 and *Burdeau* v. *McDowell*, 256 U. S. 465; or wherever the criminal proceeding contemplated or pending is in another court, like the motion in *Dier* v. *Banton*, 262 U. S. 147; *or wherever the motion, although entitled in the criminal case, is not filed until after the criminal prosecution has been disposed of*, as where under the National Prohibition Act a defendant seeks, after acquittal, to regain possession of liquor seized. And the independent character of a

summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court. This was true in *Essgee Co. v. United States*, 262 U. S. 151, *where the petition was entitled as a separate matter* and was referred to by the court as a special proceeding." (Italics ours.)

(c) In granting the petition for the delivery of the photostats, the District Court rendered its opinion on February 6, 1948. That opinion was entitled "In the Matter of Motions of Wallace & Tiernan Company, Inc., *et al.*, for the Return of Documents." It determined the law as follows:

> "In *Johnson* v. *United States*, decided February 2, 1948 (16 L. W. 4133, 4135), the Supreme Court said:
>
> 'Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects," and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.'
>
> It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no 'valid basis in law for the intrusion,' which the Government committed in making the photostats of said documents and retaining possession of them."

A "decree" accordingly was entered on February 18, 1948, and was complied with by the plaintiff without appeal.

Thus, here for a third time, determinations of issues of law and fact became final and *res adjudicata* between the same parties for all purposes and proceedings; and the plaintiff added to the finality in law finality in fact by its compliance.

Moreover, by command of Rule 41(e) of the Federal Rules of Criminal Procedure, the photostats were henceforth *not* "*admissible in evidence at any hearing or trial.*"

(d) At the foot of its opinion of February 6, 1948, the Court made the following notation:

> "Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment."

But this notation could not possibly change the facts, stated above, that the Indictment had already been dismissed *before* the petition for the delivery of the photostats was presented; and that the petition was in fact and in law an independent and separate proceeding which would and could not be converted into a non-existent something else by such a notation. (*Capitol Lumber & Supply Co. v. United States*, 259 Fed. 847, 849, C. C. A. 2.)

(e) The Department of Justice had no lawful right whatever to take advantage of its unlawful and temporary possession of the defendant's property (secured in the name of a grand jury investigation) to perpetuate such unlawful possession by taking and permanently retaining photostatic copies thereof. There is not a syllable in the United States Constitution or in any statute which authorizes any such indirect means of transferring to the files of an agency or bureau of the Executive reproduction of a citizen's private papers and the permanent retention of them there. The spirit of our Constitution and the American Tradition cry out against such a desecration of private rights and liberties.

If the Department of Justice has the right to photostat papers acquired without right and to retain the photostats, then we have the anomaly of a wrong becoming a right.

The settled law on this subject is thus succinctly stated in the first headnote to the decision of Judge Learned Hand in *United States* v. *Kraus*, 270 Fed. 578:

> "When papers of parties subsequently indicted are seized upon an illegal search, the papers *and all copies taken while the officers retained their illegal possession* must be returned, and any information obtained therefrom must not be used at the trial or in its preparation." (Italics ours.)

To the same effect are:

Essgee Co. of China v. *United States*, 262 U. S. 151, 156;
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385;
Flagg v. *United States*, 233 Fed. 481, 486 (C. C. A. 2);
United States v. *Brasley*, 268 Fed. 59, 65;
United States v. *Spallino*, 21 F. (2d) 567, 568.

The prohibitions and consequent bar of the Fourth and Fifth Amendments operate as much in a civil case as in a criminal case. (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Rogers* v. *United States*, 97 F. (2d) 691, 692, C. C. A. 1; Rule 41e of the Federal Rules of Criminal Procedure.)

(6)

Furthermore, the decree of April 20, 1948, in Criminal Action 6070 (instituted by Information after the dismissal of the Indictment), suppressing any evidence obtained from the documents ordered by the aforesaid decrees to be delivered to the defendants, is given finality by Rule 41(e) of the Rules of Criminal Procedure for the District Courts of the United States.

(a) As stated above, the Department of Justice, on May 1, 1947, over a month after the dismissal of the purported "Indictment", filed an Information under the Sherman Act in phraseology and subject matter identical with the Indictment and against the same parties. This Information was thereupon docketed as "Criminal Action Number 6070."

In that action, the defendants, on July 25, 1947, made a motion to dismiss the "Information", or, in the alternative, to preclude the plaintiff from using any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents. This latter alternative was expressed in paragraph 3 of the Notice of Motion.

By opinion dated April 14, 1948, the District Court reviewed all the prior proceedings and the determinations made therein under the Fourth and Fifth Amendments of the Constitution of the United States; denied the motion to dismiss on the ground that evidence not inhibited might be obtained "in support of the allegations in the information"; but, on April 20, 1948, entered a "decree":

> "* * * precluding and restraining the United States from using, in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents."

The Department of Justice has never taken any further steps in the criminal action instituted by this "Information", and has not attempted to appeal from that decree.

(b) Rule 41 of the Rules of Criminal Procedure for the District Courts of the United States is entitled "Search and Seizure"; and paragraph (e) thereof is entitled "Motion for Return of Property and to Suppress Evidence."

This paragraph (e) provides, among other things, that where property "was illegally seized" in the name of law enforcement and a "motion" for its restoration has been made and granted, "it (the property or the evidence supplied thereby) shall not be admissible in evidence *at any hearing or trial.*"

This Rule implements the Fourth and Fifth Amendments to the Constitution of the United States according to the principles declared in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391. It does so by operating *in rem* upon the property or evidence illegally seized or acquired. It designates a special "motion" "for the return of the property and to suppress for use as evidence anything so (illegally) obtained", as the appointed procedure for definitive determination of the issues as to illegality and suppression; and it renders the determination thereof applicable and effective *"at any hearing or trial."*

We need not stop to consider whether the theory of this Rule is the analogy of an *in rem* proceeding, or is the principle of *res judicata*, or is the recognition of such a motion as an independent proceeding equivalent to "an independent suit in equity". (*United States* v. *Rosenwasser*, 145 Fed. [2] 1015, 1016-7 [C. C. A. 2]; *Essgee Co.* v. *United States*, 262 U. S. 151, 152-3; *Fowler* v. *Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10].) It is sufficient that, whatever the theory or theories of the Rule, the Rule's

mandate and effect make the determination applicable and conclusive "at any hearing or trial" wherever such issues may again arise.

(c) The plaintiff never attempted to test out a right of appeal from the final determination made by the District Court under that Rule.

In consequence, here for the fourth time, the plaintiff has allowed a decree of the District Court and the determinations of law implicit therein to become final and conclusive.

Such decree was not, and could not be, confined by its terms to Criminal Action Number 6070, but was comprehensive of and determinative against any use by the plaintiff, anywhere or at any time, of the illegally seized papers and the illegally acquired evidence. Such evidence "shall not be used at all." (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.)

(7)

Summary

To sum up, we have this situation:

(a) The plaintiff did not appeal from the final judgment determining that the so-called "Special Grand Jury" was an unconstitutional body convened and "investigating" in violation of the Fourth and Fifth Amendments guaranteeing due process and the protection of private property, and dismissing the "Indictment (No. 6055)" on that ground. The Department of Justice concedes that such determination and judgment were correct.

(b) The plaintiff did not appeal from the final decree of March 19, 1947, directing the return of all the property compulsorily produced, seized, detained and

searched under the purported process and for the purposes of this unconstitutional Special Grand Jury on the ground that such seizure and search were not pursuant to constitutional process or for a constitutional purpose and violated the Fourth and Fifth Amendments;

(c) The plaintiff did not appeal from the final decree of February 18, 1948 directing the delivery to the defendants of the photostatic copies made by the Department of Justice of some of the seized papers while the seizure continued.

(d) The Department of Justice complied with both these decrees and thereby gave them finality in fact as well as in law.

(e) The Department of Justice did not appeal from the decree of April 20, 1948, suppressing the use of the illegally seized property and evidence. See Rule 41(e) of the Federal Rules of Criminal Procedure.

These determinations, unappealed from, and, as to the decrees of March 19, 1947, and April 20, 1948, finally and fully executed, are not the subject of appeal, review, re-call, annulment or limitation, by direction or indirection, in this civil action between the same parties and involving the same charges and allegations under the same Sherman Law. This, we submit, for the following reasons:

(a) The plaintiff's right to appeal is purely statutory. No statute authorizes the plaintiff to secure, or gives the Supreme Court jurisdiction to afford, an appeal from such determinations in the manner here attempted.

(b) A civil action cannot be used as a medium for appealing from and seeking annulment of decrees and determinations made, consummated and fulfilled in

some other action or proceeding between the same parties. No such "*collateral attack*" is permissible. (*Fowler* v. *Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10]; *Coffey* v. *United States*, 116 U. S. 427, 443; *Fowler* v. *Gill*, 156 Fed. [2] 565, 566 [D. C. App.].)

(c) The Fourth and Fifth Amendments cannot be stultified by allowing the Department of Justice, in a civil action, to subpoena or have discovery of papers and evidence which were ordered returned and suppressed in some other action or proceeding as obtained by the Government in violation of these Amendments.

(d) The plaintiff's course in complying with, and in not appealing from, determinations made in other proceedings, cannot be re-called, cured or avoided, or the plaintiff's time to appeal be indirectly extended, by allowing the plaintiff to retrace its course and start over again under cover of a civil action involving identical parties, allegations, subject matter and charges.

(e) Since the parties, issues, subject matter and charges are the same, the determinations made in the other proceedings are *res adjudicata*. (*Fowler* v. *Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10]; *Coffey* v. *United States*, 116 U. S. 427, 443; *Fowler* v. *Gill*, 156 Fed. [2] 565, 566 [D. C. App.].)

(f) Rule 41(e) of the Federal Rules of Criminal Procedure, effective March 21, 1946, expressly provides that evidence or papers suppressed by an order entered on a "motion" shall not thereafter be "admissible in evidence *at any hearing or trial*". In consequence, even if (contrary to the fact and the law) the decrees for the return of the original papers and the delivery of the photostatic copies were merely interlocutory for the purpose of judging their appealability, nevertheless this Rule makes the determinations therein of unconstitutional governmental action

conclusive in "*any*" action or proceeding or hearing where the issue again arises between the same parties.

(g) The effect of no one of the prior determinations was confined by its terms to the particular proceeding in which it was rendered. Each of the decrees was comprehensive in its determination of the violations of the Constitution and the consequent complete unavailability to the Department of Justice of the evidence or documents for any purpose.

(h) The determinations in the prior proceedings have been executed, consummated and fulfilled and such fulfillment cannot be re-called in this action.

V

The effect of the foregoing on this civil action and on this attempted appeal and on the jurisdiction of the Supreme Court of the United States.

For the reasons and on the "Grounds" already stated, we submit that the Supreme Court of the United States is without jurisdiction, and that this attempted appeal should be dismissed as not properly taken and as an attempt to challenge a judgment which the appellant itself invited and phrased.

But we further submit that the foregoing also establishes that this attempted appeal should be dismissed as merely an inadmissible effort to obtain appellate review and re-call in this civil action of determinations, repeatedly made in various prior proceedings, of the identical issues between the identical parties and on identical allegations.

The three motions which the plaintiff made in this civil action in April, 1948, all ran *solely* to the several thousand documents (property of the defendants) which

had been photostated as aforesaid by the plaintiff during the illegal but so-called Grand Jury Investigation, and to the photostats thereof ordered returned as aforesaid by the decree of February 18, 1948. (See appellant's "Statement as to Jurisdiction," p. 4.)

These motions in this civil action were entitled:

(1) "Motion to vacate order on motion for return of photostat copies of documents";

(2) "Motion for production of documents under Rule 34";

(3) "Motion for production of photostatic copies of documents surrendered by plaintiff."

So, likewise, the subpoenas *duces tecum* served herein by the Department of Justice in May, 1948, ran *solely* to the same documents photostated by the Department as aforesaid. (See appellant's "Statement as to Jurisdiction," p. 4.)

Obviously, these four procedures were merely attempts in this civil action to appeal, re-argue, re-call and annul the aforesaid determinations and decrees on the identical subject matter, allegations and issues, which had been made in the prior proceedings between the same parties and to which the plaintiff had given finality in fact and in law by compliance and failure to appeal.

Also, obviously, the District Court was right in the concluding statement in its opinion of May 26, 1948, that (p. 18):

> "It seems to me that these motions are an attempt on the part of the Government to *reargue* in this civil action matters which have been decided in the criminal case and from which the Government did not appeal." (Italics ours.)

For like reason, the District Court was also right in its decree of June 1, 1948, vacating the aforesaid attempted

subpoenas *duces tecum* for the very papers which, by the prior determinations and decrees, the District Court had repeatedly held could no longer be used by the Government.

In consequence, for these additional reasons there is no admissible basis for jurisdiction in the Supreme Court of the United States or for this attempted appeal.

The Government's right to appeal is purely statutory; and there is no statute for an appeal by it in a civil action from determinations and decrees previously made in other proceedings between the same parties.

Moreover, no appeal ever lies from the denial of a motion for reargument, however the true nature of such motion may be disguised or be given form and medium.

VI

Reply to certain assertions in the appellant's "Statement as to Jurisdiction".

1. The appellant's Statement is vitiated by its complete ignoring of the Fifth Amendment to the Constitution of the United States and of the part which it has played and must play in this subject matter.

2. It also completely ignores Rule 41(e) of the Rules of Criminal Procedure for the District Courts of the United States and its obvious applications to this subject matter, as above shown.

3. By conceding (p. 3), that the principles of constitutional law on which the District Court annulled the so-called "Grand Jury Investigation" and dismissed the purported "Indictment" were correct, the appellant's Statement must forego any challenge of the conclusive character of those determinations of law and fact wherever, when-

ever and in whatever form the same issues may arise, expressly or implicitly, between the same parties.

4. The appellant's Statement says (p. 8): "Orders on motions to suppress, entered after an indictment has been returned or an information filed, are not appealable". This statement is irrelevant, and, as an attempted generalization, is also inaccurate and inapplicable, for the numerous reasons above stated.

5. The appellant's Statement also says (p. 8): "Only final orders may be relied upon as *res judicata*". Here, again, the attempted generalization is both inapplicable and inaccurate, for the numerous reasons above stated.

6. The appellant's Statement constantly speaks of "*the right of the Government*" to do this or that.

It would be well to have in mind that in matters of justice and the administration of justice, the Department of Justice is not "the Government." It is merely an attorney for a plaintiff appearing before the Judicial Branch of the United States Government, which Branch is independent of the Executive and is, as regards the juridical rights of the parties, *the* Government so far as such term can have any pertinency at all.

7. The appellant's Statement says (p. 6):

> "There is, on the other hand, no actual search or seizure when documents are produced pursuant to legal process."

This may be true if the word "actual" means "unlawful" and the word "legal" means "lawful". Otherwise, the Fourth Amendment would be reduced "to a form of words." (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392.)

8. The cases cited in the appellant's Statement (pp. 6, 7) to the effect that where a subpoena *duces tecum*, lawfully issued for production of papers before a lawful officer or body, is "suitably specific and properly limited in its scope," "there is no unreasonable search and seizure within the meaning of the Fourth Amendment," are irrelevant and the argument begs the question. Such is not the only requirement of the Fourth Amendment. There must also be lawful authority and lawful purpose.

The point here is not that the subpoenas were too broad, indefinite or unreasonable, but that they were issued in a purported investigation by, and for compulsory disclosure of papers before, an unconstitutional body having no lawful authority whatever to conduct such investigation or to have process for its aid.

9. The appellant's Statement speaks (p. 6) of distinguishing "between cases of actual search and seizure and cases of the 'figurative' or 'constructive' search involved in the production of books or records in obedience to judicial process." It cites *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 202. That case involved the authorized issue of a reasonable subpoena by a lawfully authorized officer, to wit: the Administrator of the Fair Labor Standards Act.

But the citation of that case is unfortunate for the appellant for, on the very page cited, the opinion therein recognizes as expressive of the law the following quotation in the footnote (p. 202):

> "'In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power.' Lasson, Development of the Fourth Amendment to the United States Constitution, 137, citing *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Hale* v. *Henkel*, 201 U. S. 43, 76; Cf. *Boyd* v. *United States*, 116 U. S. at 634, 635 (as to which see also notes 33 and 36);

> "* * * We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited * * * is the equivalent of a search and seizure—and an unreasonable search and seizure within the meaning of the Fourth Amendment."

10. Finally, the appellant's Statement presents, as its chief reliance, the obviously fallacious and irrelevant theories: (1) that the subpoenas *duces tecum* issued by and for the "Special Grand Jury" were not process, to be judged as to validity according to the Fifth Amendment; and (2) that the subsequent search, examination, use and photostating of the documents thus compulsorily secured were not search and seizure to be judged as to validity according to the Fourth Amendment.

The emptiness of these contentions is conclusively revealed by the very contents of the subpoenas *duces tecum*, quoted under IV (4), *supra*, and by the concession that the "Special Grand Jury" and the "Indictment" were rightly annulled.

In the argument on March 19, 1947, Mr. Karsted (Assistant Attorney General) expressly conceded (pp. 94, 95) that "the documents were originally brought in *pursuant to a Grand Jury subpoena*," and that "*the Court ant them as a result of an illegal process.*"

If the appellant's present contentions could, by any possibility, uphold the right of the Department of Justice to retain, indefinitely the photostatic copies, they would equally have upheld the right of the Department to retain indefinitely the originals, notwithstanding the annulment of both the unconstitutional "Grand Jury" and its "Indictment."

If, as the District Court held, the taking itself (which taking was *ex nomine* for the use of the "Special Grand Jury" and in a proceeding alleged to be before it), was illegal and without constitutional authority, the exercise of opportunities which such illegal taking afforded to the

Department of Justice and to the illegal body was necessarily tainted with the illegality of the taking itself. For there was no other source for either the opportunity or the exploitation of it. As this Court quite properly said on March 19, 1947, in granting the defendants' motion to annul the taking itself (Tr. p. 95):

> "When there are documents that grow out of a grand jury process that has now been held to be an illegal grand jury, doesn't everything that belongs with it become tainted with that illegality?"

> "Certainly, if by taking advantage of a subpoena issued colorably for the use of a grand jury which has no constitutional existence, the Department of Justice can possess itself lawfully of the private papers of a private citizen, or give itself the right to make copies thereof, an administrative department of the Government will thenceforth be clothed with an extra-legal process for seizure and search of private papers and for the indefinite retention and use thereof and of all the information contained therein, not only contrary to the express prohibitions of the United States Constitution, but without any justification in the common law. As said by the Supreme Court of the United States in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391-2:

> "* * * The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had. * * * In our opinion such is not the law. It reduces the Fourth Amendment to a form of words, 232 U. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Italics ours.)

III. We conclude this subject by quoting the following pertinent language from *Feldman v. United States*, 322 U. S. 487, 492:

> "* * * When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co. v. United States*, 282 U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Byars v. United States*, 273 U. S. 28."

CONCLUSION

Jurisdiction should be refused or, in the alternative, the attempted appeal should be dismissed.

Dated, November 4, 1948.

Respectfully submitted,

CHARLES H. TUTTLE
EDEN N. WOOD
WILLIAM H. EDWARDS
Of Counsel

EDWARDS & ANGELL
Attorneys for Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius J. Schenck

LAURENCE J. HOGAN
Of Counsel

HOGAN & HOGAN
Attorneys for Kovatch Agene Corporation and Industrial Appliance Corporation.

S. EVERETT WILKINS, Jr.
MATTHEW W. GOKING
Of Counsel

HINCKLEY, ALLEN, TILLINGHAST & WHEELER
Attorneys for Builders Iron Foundry, Henry S. Chafee,